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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 1302

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

150.29 ACRES OF LAND, MORE OR LESS, IN MILWAUKEE COUNTY, WISCONSIN, and VLASTA KRIZ, et al.,
Defendants.

ELINE'S INC.,
Petitioner and Appellant Below

vs.

GAYLORD CONTAINER CORPORATION,
Respondent and Appellee Below.

PETITION FOR WRIT CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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HAMMERSMITH-NORTHCOTE CO., MILWAUKEE

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STATUTES

IN THE

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To the Honorable Harlan F. Stone, Chief Justice of the United States, and the associate Justices, Supreme Court of the United States:

The petitioner prays for a writ of certiorari to review the judgment entered March 5, 1945 (motion for rehearing denied March 22, 1945) in the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed a judgment entered by the United States District Court for the Eastern District of Wisconsin in favor of the respondent.

OPINIONS BELOW

The majority opinion of the Circuit Court of Appeals (Circuit Judge William M. Sparks and District Judge Charles G. Briggle) and the minority opinion (Circuit Judge Evan A. Evans) are reported in 148 Fed. (2) 33 (R 637-647). No opinion was rendered by the District Court.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered March 5, 1945. Petition for rehearing was duly and seasonably filed with the Circuit Court of Appeals (R 649), which petition for rehearing was denied March 22, 1945 (R 661). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229 (43 Stat. 938) (28 U.S.C.A. 347).

The cases believed to sustain jurisdiction are as follows:

Mitchell v. United States, 267 U. S. 341.
Bothwell v. United States, 254 U. S. 231.
United States ex rel T.V.A. v. Powelson, 319 U. S. 266.

SUMMARY STATEMENT

In a condemnation proceeding instituted by the United States under the Second War Powers Act to acquire fee title to an industrial building development of about 670,000 square feet (R 577), including 91.20 acres of land owned by the petitioner, a fund representing the entire value of the petitioner's lands and buildings as agreed between the United States and the petitioner was paid into the Registry of the District Court.

The respondent Gaylord used a portion of the premises (62,420 square feet) as a corrugated container plant under a written lease from petitioner, which lease at the date of taking had 6 years and 8 months to run (R 541). The rental under the lease was $15,000 per annum. The jury awarded Gaylord $111,792, to be paid out of the fund, for the taking by the United States of its entire leasehold.

Gaylord introduced evidence which, though controverted by Eline's witnesses, fixed the enhancement in the rental value of the leasehold for the unexpired term at $32,843.16 (R 92)[1] that is, the excess of fair market rental for 6 years and 8 months above the $15,000 annual rent Gaylord would have to pay under the lease.

As a second item, Gaylord claimed as part of just compensation the reproduction cost of improvements added by Gaylord and the cost of installing machinery ($9,992.60) in the total sum of $27,192.12 (shown in Exhibit 32, R 95, 248, 567-574) received in evidence over the objection of Eline's (R 53, 56, 70, 248) despite a provision in the lease to the effect that all improvements placed on the premises by Gaylord were to become Eline's property and be surrendered on termination of the lease by lapse of time or otherwise (R 541), and despite the fact that no evidence as to the value of the use of these improvements during the balance of the term was offered by Gaylord (R 137, 139, 77).

In addition to the two foregoing elements, Gaylord claimed, as part of just compensation, so-called "ready-to-go" value (R 95). The trial court, over objection of Eline's (R 167, 211, 254) permitted witnesses to testify that, in

[1]-$24,843.16 constituted rent enhancement on the building (R 89) and $8,000 rental value of a parking lot (R 92).

addition to the increase in rental value over the amount of rent reserved, and the reproduction cost of improvements, they attributed to the leasehold an additional "ready-to-go" value. The "ready-to-go" value is based upon what an alleged purchaser of the leasehold (combined with the machinery and business) would be willing to pay for the leasehold combined with the machinery and business in order to go into possession and immediately produce paper containers, thus avoiding all delays incidental to getting the container business operating. The valuation is based upon an estimate of the value of anticipated profits resulting from business to be conducted on the leased premises. The evidence supporting the claim of so-called "ready-to-go" value which was received over objection (R 166-168; 177; 183; 217; 227; 287; 289; 291-293) and which the court refused to strike and allowed to go to the jury (R 240, 294; 326; 332; 531) may be briefly summarized as follows:

HUGH STRANGE, a container manufacturer, unfamiliar with real estate values (R 169) testified that in addition to the $32,843.16 which was the increment in the rental value of the floor space and parking lot, and in addition to the cost of improvements and installation of machinery in the sum of $27,192.12 (shown in Exhibit 32 (R 248, 567-574) this lease had a "ready-to-go" value in the sum of $170,000 (R 161-166.) He stated that he would pay $420,000 for the plant (leasehold machinery, and attached business values) (R 167). He thought he would be capable of making a gross profit of $300,000 from the plant (R 167, 176) and a net profit of $60,000 per year over balance of the term, taxes being 80%. That the plant is worth seven times annual earnings or $420,000 (R 167). From this he deducted $250,000 as representing the value of the machinery; the balance of $170,000 is the third element of lease-

hold value (R 167). His estimate is not based upon Gaylord's operations (R 169), but upon his estimate of the reasonable possibility of operating the plant 16 hours per day at an output of 1500 tons each month (R 168). He admitted that the expectation of the production of profits is the basis of his estimate of plant value (R 177, 183), and that he didn't consider what he would value the leasehold if the business were conducted at a loss (R 183).

MARCUS B. HALL. This witness, likewise a container manufacturer, and unfamiliar with real estate (R 221) testified substantially the same as Strange that in addition to the increase in rental value of the property of $32,843.16, and the improvements of $27,019.12 (211) (shown in Exhibit 32 (R 248, 567-574), the leasehold had an additional value of $150-$180,000 (R 211). This estimate does not include the value of the machinery when removed (R 212). Mr. Hall estimated the plant could produce 1350 tons per month (R 216) and that it could earn $4.00 per ton or a total of $64,800 per year (R 217). He estimated that the value of the balance of the leasehold was six times annual earnings (R 217). In his opinion the plant (leasehold, machinery and equipment) had a value of $388,800 (R 211, 217, 236). From this he took away $202,000 which in his opinion represented the value of the machinery, which left $186,800 (R 218). He also admitted that his opinion represents the "earning capacity" (R 217, 227). His estimate is not based on Gaylord's production but on his own estimate of what could be earned over 80 months (R 217). He admitted that if the business was not making money, the leasehold would have no value (R 236). His opinion is not based on any actual transaction (R 234).

WALTER C. GEORGE. This witness, an employee of Gaylord from St. Louis, and not familiar with real estate

values (R 249) testified that it took about three or four months to install the machinery new and that it took about one year to get the plant up to full operating efficiency (R 245). In addition to increase in rental value of $32,-843.16 and improvements of $27,192.12, the leasehold was enhanced as of July 1, 1942 by about $175,000 (R 254-255). This enhancement, he stated, was due to developing the machinery or eliminating the difficulties in the combined unit (R 256). He placed a value of $202,000 on the machinery at the time it was moved out (R 253). The $175,000 enhancement above mentioned he stated "is a figure that represents expenditures to get this plant going" (R 270) or development expenses. In it are included estimated expenses incurred as follows:

(1) Waste, $3,000 in boxes per month for 12 months	$36,000
(2) Labor, $150,000 payroll per year times 10%	15,000
(3) Factory expense ($1,000 per month for 12 months)	12,000
(4) Fuel, moving material in building	7,000
Total	$70,000

(R 270-271)

The witness estimated that by reason of war conditions the cost of doing the job over again on July 1, 1942 would be 2½ times what had been spent by the company and therefore he multiplied the $70,000 by 2½ (R 274). This multiplier of 2½ is not based on any statistics or price trends (R 285-286). This $70,000 (not taken from books (R 270)) has been charged off as expense in income tax returns and was not treated as a capital investment (R 274). He testified that the $70,000 has to do with the getting of

the new machinery into a coordinated unit and delay and losses in coordinating the plant (R 283). When Gaylord moved out there was no part of that $70,000 left in the property that could be used or appraised (R 283, 285). He stated:

"I am basing it on its value; in value to us." (R 285).

He also stated:

"We are valuing this as a loss to us." (R 285).

George's estimate is not based on any actual transactions (R 287) but upon combined value of leasehold and machinery (R 257), and upon profits to a person who takes over the entire business and can get into the plant and immediately go to work (R 287, 290, 291, 292).

The verdict and judgment were of necessity based in large part upon this testimony, which was allowed to stand and go to the jury, because the jury verdict of $111,792 exceeded Gaylord's only evidence as to increase in rental value and cost of improvements, which totaled about $60,000. The District Judge throughout the entire trial expressed grave doubt as to the validity of the claim for "ready-to-go" value (R 130-133; 162-163; 163-167; 240; 250-253; 328-332; 531). The trial judge though receiving the proof pertaining to "ready-to-go" value, repeatedly stated that the Government did not take the machinery nor the business, and that the same could not be compensated for (R 87, 163; 205; 257; 492; 529).

The District Court held the sale clause (R 561) fixing at $40,000 the amount to be paid to the respondent on sale of the leased property to the inapplicable (R 332, 530). It also held the condemnation clause (R 530) inapplicable. The Circuit Court of Appeals affirmed the judgment, Judge Evans dissenting as to the inapplicability of the sale

clause. The Circuit Court of Appeals apparently held that its decision in the *General Motors Case*, as modified and affirmed by this court, determined that "ready-to-go" value claimed by Gaylord was proper. The Circuit Court of Appeals admitted, however, that the *General Motors Case* was "not completely parallel" (R 645).

QUESTIONS PRESENTED

A. Whether on condemnation by the United States of real estate only (an entire leashold), just compensation includes so-called "ready-to-go" value (over and above the fair market value of the real estate), which so-called "ready-to-go" value is based upon what an alleged purchaser of the interest in real estate combined with the machinery and the business would be willing to pay in order to go into possession and continue production and avoid all delays, expense and inconvenience incidental to getting the machinery and business operating, and which was arrived at by estimating the value of attainable future profits of a container business to be operated on the real estate?

B. Whether in a condemnation of the entire term of a leasehold the lessee is entitled to claim the reproduction cost of improvements and cost of installing machinery (Exhibit 32, R 248; 567-574), unaccompanied by any evidence of the value of the use, where under the terms of the lease all improvements made by lessee were lessor's property subject to lessee's right to use the same during the balance of the demised term?

C. Whether in condemnation by the United States a lease stipulation (R 561) fixing the amount to be paid to the lessee on sale of the leased premises is inapplicable where the lease contains a condemnation clause which, as

construed below, excludes condemnation by the United States?

D. Whether a condemnation clause in a lease (R 545) which is inclusive of condemnation "by any company or corporation lawfully qualified to exercise the right of eminent domain" applies to a condemnation by the United States?

REASONS FOR GRANTING THE WRIT

A. In the instant case the Government took the entire fee of Eline's, and the entire leasehold of Gaylord, and hence as the Circuit Court of Appeals purported to recognize the facts differ from those of the General Motors Case. However, the decision of the Circuit Court of Appeals in allowing on the supposed authority of *U. S. v. General Motors,* 65 S. Ct. 357, 89 l. ed. Adv. Op. 379, as a part of just compensation, "ready-to-go" value which is a value over and above the fair market value of the real estate taken, and which is based upon what an alleged purchaser of real estate combined with the machinery and business would be willing to pay in order to go into possession and start production and avoid all delays, expense and inconvenience incidental to getting the machinery and business operating (arrived at by a capitalization of obtainable-future profits) is a decision of a Federal question in a way probably in conflict with the applicable decisions of this Court, particularly those of *Mitchell v. United States,* 267 U. S. 341, *Bothwell v. United States,* 254 U. S. 231 and *United States ex rel T. V. A. v. Powelson,* 319 U. S. 266. Although this Court in the *General Motors Case* denied that it was overruling the long line of decisions relating to consequential damages, the Circuit Court of Appeals in this case has in effect construed the decision in the *General Motors Case* as reversing the rules of consequential damages.

Petitioner has been informed that the government has filed or will shortly file a petition for writ of certiorari to review a decision in *United States of America v. Petty Motors* (CCA 10, March 5, 1945) 147 Fed. (2) 912 in which the tenth circuit has likewise construed this Court's decision in the *General Motors Case,* 65 S Ct. 357, 89 l. ed. Adv. Op. 379, as reversing the rule of consequential damages in leasehold cases.

B. The decision of the Circuit Court of Appeals in allowing a lessee to recover the reproduction cost of improvements and cost of installing machinery, unaccompanied by any evidence of the value of the use (where under the terms of the lease all improvements made by lessee were lessor's property subject to lessee's right to use the same during the balance of the demised term) is in conflict with Carlock v. United States, 53 Fed. (2) 926, 927 (C.C.A. D. of C.) and other decisions, and is an important question of Federal law relating to compensation in condemnation which has not been but should be settled by this Court.

C. The decision of the Circuit Court of Appeals holding that the liquidated damage or sale clause does not limit the compensation recoverable from the United States for the taking of respondent's leasehold seems to involve an important question of Federal law relating to compensation under the Fifth Amendment, payable to a leesee, which has not been but should be settled by this Court.

D. The decision of the Circuit Court of Appeals holding that the United States is not a corporation within the meanof the condemnation clause of the lease seems to involve an important question of Federal law which has not been but which should be settled by this Court.

WHEREFORE, this petitioner prays that a writ of certiorari be granted so that this case may be reviewed by this Court; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, May 17, 1945.

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